

1 UNITED STATES DISTRICT COURT
2 DISTRICT OF MASSACHUSETTS
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4 IN RE: NEW ENGLAND) MDL NO. 13-02419-FDS
5 COMPOUNDING)
6 PHARMACY CASES LITIGATION)
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9)
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11)

12 BEFORE: THE HONORABLE F. DENNIS SAYLOR, IV

13 STATUS CONFERENCE
14

15 John Joseph Moakley United States Courthouse
16 Courtroom No. 2
17 One Courthouse Way
18 Boston, MA 02210
19

20 August 9, 2013
21 1:30 p.m.
22

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24 Official Court Reporter
25 John Joseph Moakley United States Courthouse
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Boston, MA 02210
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PROCEEDINGS

THE CLERK: All rise. Thank you. Please be seated. Court is now in session in the matter of in re: New England Compounding Pharmacy, Incorporated Products Liability Litigation. This is Case No. 13-md-02419. Counsel for PSC, please identify yourselves for the record.

MS. PARKER: Good afternoon, your Honor, Kristen Johnson Parker for the plaintiffs' steering committee.

MR. STRANCH: Good afternoon, your Honor, Gerard Stranch for the plaintiffs' steering committee.

MR. CHALOS: Mark Chalos on behalf of the steering committee.

MR. ELLIS: Rick Ellis for various plaintiffs.

MR. FENNELL: Patrick Fennell for plaintiffs' steering committee.

MS. DOUGHERTY: Kim Dougherty, plaintiffs' steering committee. Good afternoon, your Honor.

THE COURT: Good afternoon.

MR. HUGO: Mike Hugo, various plaintiffs. Good afternoon, your Honor.

Ms. Fordon: Rebecca Fordon, official creditor's committee.

1 MS. TAYLOR: Kiersten Taylor, official
2 creditors' committee.

3 MR. COREN: Michael Coren, official
4 creditors' committee.

5 MR. STERNKLAR: Good afternoon, your Honor,
6 Jeffrey Sternklar for the Chapter 11 trustee, Paul
7 Moore.

8 MR. GOTTFRIED: Michael Gottfried for the
9 trustee, your Honor.

01:33PM 10 MS. KUNDERT: Lisabeth Kundert for GDC
11 Properties.

12 MR. THOMAS: Joe Thomas for GDC Properties.

13 MR. FERN: Frederick Fern, liaison counsel
14 for NECC, Judge.

15 MR. TRANEN: Daniel Tranen for NECC.

16 MR. RABINOVITZ: Dan Rabinovitz for MSM.
17 Good afternoon, your Honor.

18 MR. NADEL: Good afternoon, your Honor,
19 Heidi Nadel for Doug and Carla Conigliaro.

01:33PM 20 MR. MORIARTY: Good afternoon, your Honor,
21 Matthew Moriarty for Ameridose.

22 THE COURT: All right. Good afternoon,
23 everyone. This is a status conference in this case.
24 Again, I'll ask people to speak into the microphone and
25 keep your voice up because we have people participating

1 by telephone.

2 MR. EIFERLEY: Your Honor, I don't know if
3 you can hear me.

4 THE COURT: Yes. Who is this?

01:34PM

5 MR. EIFERLEY: Andrew Eiferley appearing on
6 behalf of Neuromuscular Rehabilitation Associates in
7 Northern Michigan. We're not technically a party, but
8 we have a limited appearance for a subpoena that was
9 served upon our motion. Again, my name is Andrew
10 Eiferley, E-i-f-e-r-l-e-y.

11 THE COURT: Yes. All right. I have a list
12 of attorneys who are present on the phone. I'm not
13 going to ask you to identify yourself. I think only one
14 attorney indicated that he wanted to be heard, but I'll
15 give you an opportunity should the occasion arise. But
16 let me hear first -- I guess who's going to take the
17 lead for the PSC? I have the agenda in front of me,
18 and, again, I propose to go through it item by item.
19 Ms. Parker.

01:34PM

20 MS. PARKER: Good afternoon, your Honor.
21 First item we have on the agenda is the status of the
22 PSC's discovery efforts. I suggest that it makes sense
23 to address that item as well as Number 10 dealing with
24 the objections to subpoenas and Number 4, the conduct of
25 the discovery order at the same time. It's a little bit

1 out of order, but it's all the same subject matter.

2 THE COURT: All right.

3 MS. PARKER: So in terms of the PSC's
4 discovery efforts, as this Court well knows, the PSC has
5 issued I believe it's over 80 subpoenas now to pain
6 clinics. We have also issued additional subpoenas to
7 various entities in what we call the national
8 defendants' camp. We have to date received production
9 from three of the national defendants in response to
01:35PM 10 those subpoenas. That includes Liberty, UniFirst and
11 Scientific Air Analysis.

12 We've also received productions as of
13 yesterday from at least three pain clinics. Those
14 materials are all in the process of being uploaded to
15 the single document repository that has been created in
16 this case. We hope that that upload will be completed
17 today. It may spill over into the first part of next
18 week.

19 That brings us into, I think, some questions
01:35PM 20 about how to access that repository. Mr. Zamora for the
21 plaintiff's steering committee expected to be here today
22 discussing that with the Court, but the weather has
23 rerouted him to Philly. I understand though that we
24 have a single-page protocol that will describe how
25 parties can get access to that document repository. It

1 also requests some information from the defendants in
2 order to set up that access, of course, and that that
3 protocol is expected to be shared with the defendants on
4 Monday.

5 THE COURT: All right. My sympathies to
6 Mr. Zamora for being in Philadelphia today.

7 [Laughter]

8 MS. PARKER: Then in terms of subpoenas,
9 your Honor, since we had our last status conference, the
01:36PM 10 Court has issued an order that addresses two of the
11 substantive objections to subpoenas. That is both the
12 jurisdictional and the enforcement objection and also
13 the plaintiff information, I'm sorry, excuse me, the
14 patient protected information objection.

15 Your Honor has also referred the remaining
16 objections to Magistrate Boal. The plaintiff's steering
17 committee sent Magistrate Judge Boal a letter earlier in
18 the week suggesting that we schedule a hearing or in the
19 alternative asking how the Judge would like to proceed.

01:37PM 20 We have not yet heard from the magistrate.
21 We realize we only sent that letter to her recently, but
22 I mention it to your Honor for purposes of informing you
23 that we are intending to proceed with Magistrate Boal on
24 that process.

25 THE COURT: All right. This may be out of

1 order, but there were some subsequently entered
2 objections and motions to quash that I'm going to refer
3 to Magistrate Judge Boal again pursuant to my order of
4 August 1st: If I have an up-to-date agenda, that would
5 be docket entry 372; objection by Pain Associates of
6 Charleston, 378, which is a letter request from
7 Rochester Brain & Spine Neurosurgery and Pain
8 Management -- it's a letter to Judge Boal. It's not
9 clear to me whether there's anything requested there or
10 not, but that will be referred -- and a motion to quash
11 filed by Universal Pain Management, Number 383; and a
12 letter request from Halley Stephens representing Pain
13 Consultants of West Florida, Number 384. All of those
14 will be referred to the magistrate judge.

01:37PM

15 All right. Anything else on that topic,
16 Ms. Parker?

17 MS. PARKER: I note that Number 4 on our
18 agenda is the conduct of discovery order. I don't think
19 there's anything particularly contentious about that
20 order, but I will let the Court know that the defendants
21 currently have a draft of that order from the
22 plaintiffs' steering committee. We've gone back and
23 forth a few times already, and we're optimistic that
24 that will be done and addressed before the next status
25 conference.

01:38PM

1 THE COURT: All right. Remind me, the
2 conduct of discovery means what?

3 MS. PARKER: Perhaps Mr. Moriarty would like
4 to address that.

5 MR. MORIARTY: Yes, your Honor. We sent
6 them --

7 THE COURT: Speak into the mic. again so
8 everyone can hear you.

9 MR. MORIARTY: We sent them a conduct of
01:38PM 10 discovery order from another case that covers how
11 depositions are set up, where they are to take place,
12 things like national court reporting services, telephone
13 access to depositions, all the logistical things that
14 surround production of documents, depositions, things of
15 that nature, and they sent a different version back to
16 us.

17 We red-lined it and got some comments from
18 some other defendants, sent it back, and I told them
19 when I did that that there were some other defendants
01:39PM 20 that had not yet weighed in, so it's bouncing back and
21 forth, but I don't expect a lot of, as Ms. Parker refers
22 to it, contentious issues.

23 THE COURT: Okay. Thank you. All right.
24 Ms. Parker.

25 MS. PARKER: That's everything on discovery

1 at the moment, your Honor.

2 THE COURT: All right. Let's take up
3 Number 2. Does anyone want to comment on the discovery
4 position, anyone want to weigh in here on any issues
5 we've discussed so far?

6 (No response)

7 THE COURT: All right. Number 2, mediation
8 order. Ms. Parker.

9 MS. PARKER: Mr. Chalos will be addressing
01:40PM 10 that for the plaintiffs' steering committee.

11 MR. CHALOS: Yes, your Honor, if it's okay
12 with the Court, I'd like to use the lectern.

13 THE COURT: Yes.

14 MS. PARKER: Actually, Mr. Chalos, I
15 apologize. There is one other discovery matter, your
16 Honor, I'd be remiss for not mentioning, which is that
17 the plaintiffs' steering committee and the trustee for
18 New England Compounding Committee have been engaged in
19 some informal discovery. I think that it's fair to say
01:40PM 20 that that process is moving along, but it is moving
21 along more slowly than I think any entity would have
22 hoped, but that is in the works, and I don't want to
23 shortchange the trustee by at least not acknowledging
24 that.

25 THE COURT: Okay. Mr. Chalos.

1 MR. CHALOS: Your Honor, Mark Chalos on
2 behalf of the plaintiffs' steering committee. The
3 plaintiffs' steering committee, the creditors' committee
4 and the trustee have met on the telephone and exchanged
5 enumerable e-mails seeking to get to an agreed mediation
6 order to present to the Court.

7 We are probably 80 or 85 percent of the way
8 there. We reached a point where we all, I think,
9 concluded that we had some differences that we needed
01:41PM 10 the Court's intervention on, but I think importantly
11 what we do share, I think, are three goals: One, we
12 want a program that is going to work or at least have
13 the most likelihood of being successful in presenting a
14 global or near global resolution of these claims; two,
15 we want a program that doesn't impair the rights of the
16 victims and doesn't impair the rights of the defendants;
17 and, three, we want a system or program that's efficient
18 and recognizes that we're dealing with a finite amount
19 of money, finite resources and a global desire to be
01:41PM 20 mindful of the efficiency of the process and to avoid
21 any waste or excess use of resources.

22 So I think there are three areas where we
23 have a disagreement, three that I think are I don't want
24 to suggest they're minor, but I think they're perhaps
25 less important, and then there's one area, I think,

1 that's particularly important, and I'd like to address
2 just the three less substantial issues first.

3 Number 1 is the issue of what will be the
4 obligations of participants in the mediation program
5 with respect to identifying other parties that may have
6 liability for the conduct at issue, and the difference I
7 think there, I mean, first of all, we agree with the
8 creditors' committee, with the trustee that some
9 participants should be called to identify other parties
10 that may have or other entities that may have liability.

01:42PM

11 And I remind your Honor that that's
12 something that your Honor's order back in I believe it
13 was June set forth and contemplated that this program
14 would require all the participants to identify
15 particular I think it's paragraph 80 that would identify
16 other potentially responsible entities.

17 So we agree that the creditors' committee,
18 the trustee and the plaintiffs' steering committee all
19 agree that at least some participants ought to be
20 required to make those identifications, and we're only
21 dealing with entities that are known to the participants
22 as having potential responsibility. You know, what they
23 don't know, they don't know, and we're not imposing any
24 obligations beyond than tell us what you know at this
25 point.

01:43PM

1 The disagreement is the steering committee
2 believes that that should apply universally, it should
3 apply to all participants in all states, and it should
4 require that they have to make those identifications.

5 The creditors' committee and the trustee
6 believe that it should only be required in they've
7 identified three states. I believe their basis is that
8 those are three states with a one-year statute of
9 limitations, it's Tennessee, Ohio and Nevada in their
01:44PM 10 analysis, and the second area I think of disagreement is
11 that the plaintiffs' steering committee believes that
12 these identifications should be binding on the
13 participants making them.

14 In other words, the obligation on the
15 participant is to identify all known other parties or
16 other entities that may bear fault for the injuries at
17 issue here, and if there exists other entities known to
18 the participants that may bear fault, the participant
19 can't come back later should the mediation program not
01:44PM 20 succeed entirely and identify those parties for purposes
21 of asserting comparative fault.

22 In other words, you know, "speak now or
23 forever hold your peace" with respect to known entities,
24 known to the participants that may bear some fault, so I
25 think those are the two areas of disagreement: 1,

1 whether it should apply universally to all participants
2 regardless of the states in which their conduct arose;
3 Number 2, the steering committee believes that it ought
4 to have teeth, it ought to be binding, they ought not to
5 be able take -- the defendants ought not to be able to
6 take advantage of the delay that the mediation program
7 would necessarily impose for purposes of obscuring other
8 entities that may bear some fault.

9 There's a practical I think effect of
01:45PM 10 requiring to "put up" or "shut up" essentially notion,
11 and that is it will bring potentially more parties into
12 the process or more entities into the process. This is
13 not a -- it's not merely a theoretical concern.

14 We have an example in Tennessee where there
15 are some state court litigation that's since been
16 dismissed after your Honor's order on the "related to"
17 jurisdiction. We're in the process of early discovery.
18 After two motions to compel, the plaintiffs there
19 learned about two entities, one person, one entity that
01:46PM 20 they had no idea existed, and it turns out that these
21 other entities were involved in the decision to purchase
22 drugs from NECC.

23 Now, they may have liability, they may have
24 insurance policies, they would have been entirely
25 unknown to the claimants had not that discovery taken

1 place. Now, they were known to the clinic defendant
2 there, the clinic defendant had a contractual
3 arrangement with these other entities or some other
4 business arrangement, so it's not merely a theoretical
5 concern, it's a very practical concern, and the effect
6 would be necessarily to bring more parties to the table
7 that could conceivably contribute to local settlement.

8 And the burden that this -- and I know this
9 is a concern of the trustee and a concern of the
01:47PM 10 creditors' committee that, you know, the more barriers
11 to entry this mediation order presents, you know, the
12 fewer participants we'll ultimately see. Should we file
13 tomorrow a lawsuit, the Federal Rules would impose on
14 the defendants the obligation within 20 days to make
15 their affirmative defenses, which would include a
16 contributory comparative negligence, comparative
17 fault-type other party.

18 So this requirement, while it may sound
19 onerous, really is nothing more than the rules would
01:47PM 20 impose anyway should we go file the lawsuit tomorrow.
21 Without this provision, without it having the teeth of
22 being mandatory and binding and non-expandable, the
23 claimants are in the position where they may just need
24 to file their case anyway, and I don't know that that's
25 the best use of everybody's resources to have another

1 couple hundred cases filed here for the purpose of
2 triggering the obligation to identify these other
3 parties that may have liability, that's issue Number 1.

4 Issue Number 2 relates to the subpoenas, and
5 the bigger context is the mediation order as proposed
6 requires certain categories of documents to be produced
7 as a precondition to participating in the mediation. In
8 other words, for any entity that wants to participate,
9 they have to submit that they will produce a certain set
10 of categories of documents.

01:48PM

11 There may be some additional to that as well
12 in the discretion of the discovery master, and we've
13 through the compromised process and the negotiations
14 with the creditors' committee and the trustee, there's
15 been give and take, and we've arrived at a list that we
16 largely agree on.

17 That's one category that the plaintiff's
18 steering committee urges that this Court adopt as well,
19 and that is for recipients of subpoenas, and Ms. Parker
20 mentioned we had served I think 85 subpoenas or so,
21 there have been to date 35 or 40 objections. For
22 recipients of those subpoenas who have not filed any
23 objection or have filed an objection and withdrawn the
24 objection, that they be obligated to respond to the
25 subpoena.

01:49PM

1 There are at least a dozen clinics who the
2 PSC is in ongoing negotiations with to respond to the
3 subpoena. These other clinics have said, you know,
4 we'll respond in some form or fashion, and the question
5 is what does that look like, and that's the subject of
6 ongoing negotiations.

7 Two clinics have already produced their
8 documents, and it's the plaintiffs' steering committee's
9 position that for entities that receive these subpoenas
10 and, you know, receive them properly and have not
11 objected, and the time for returning the subpoenas has
12 come and gone on and the time for production has come
13 and gone, and if they haven't objected, then we presume
14 that they don't have an objection, they haven't spoken
15 up yet, and for those clinics, they ought to be required
16 to continue the process of responding to those
17 subpoenas, and they ought not to be relieved of the
18 obligation to respond to a duly-issued and duly-served
19 subpoena from this Court merely by the entry of this
20 mediation order, so that's issue Number 2.

21 Issue Number 3 is with respect to a
22 mediation committee which paragraph 12 of the proposed
23 order, the creditors' committee and trustee's version
24 includes yet another committee, a mediation committee
25 composed of five members of other committees. It's the

1 plaintiffs' steering committee's position that there's
2 no need for another committee.

3 We, at the outset, the Court and the parties
4 have said, as one of their agreed values, that this
5 litigation would be conducted as efficiently as possible
6 without unnecessary bureaucracy. We've got a PSC that's
7 limited in number. We don't have the usual layers that
8 you may see in some other larger MDLs. The PSC's
9 position is we don't need another committee.

01:51PM

10 Your Honor has already in MDL Order No. 2,
11 paragraph 9(d)(1) has set forth the responsibility for
12 conducting settlement. It says the PSC's responsibility
13 is to negotiate a proposed settlement of cases on behalf
14 of the plaintiff or plaintiff group, including
15 exploring, and where appropriate, pursuing all
16 settlement options concerning any claim or portion
17 thereof.

01:51PM

18 Now, we've involved in all of our
19 discussions the creditors' committee, where appropriate,
20 the trustee, and we don't see the need for yet another
21 committee. We've been able to, you know, with the PSC
22 discharging its Court-ordered obligations, we've been
23 able to make progress, and I don't see and the PSC sees
24 no reason to create yet another layer of bureaucracy
25 that will necessarily cause more delay, more waste of

1 resources. Your Honor has already dealt with this issue
2 back in April of this year.

3 So those are the three issues that -- three
4 areas of disagreement, and there's one I think very
5 significant area of disagreement that may be a little
6 bit more difficult to resolve or maybe not. That's the
7 question of which court has oversight over the mediation
8 process as a whole.

01:52PM 9 It's the plaintiffs' steering committee's
10 position that this Court ought to have oversight over
11 any type of global mediation program involving tort,
12 personal injury claims and wrongful death claims.

13 It's the position of the steering committee
14 that when the judicial panel for multi-district
15 litigation centralized this litigation here, it was in
16 the panel's contemplation, in fact, it's in the panel's
17 order, that one of the charges for this Court would be
18 to oversee a global resolution or at least oversee the
19 possibility of a global resolution.

01:53PM 20 It's a fundamental principle of MDLs that
21 the transferer court is in a unique position to oversee
22 a global resolution. It happens in most MDLs as it
23 ought to, and it's the type of this issue that this
24 Court is uniquely positioned to oversee.

25 Your Honor's case management orders, I

1 think, have contemplated that. The initial -- the
2 June 28th, 2013 case management order, which is the
3 order that established the mediation program in the
4 first instance, I think it's important that that's the
5 genesis of the mediation program. It came from your
6 Honor's order in this court, so that's an important, I
7 think, principle to recognize, you know, what the
8 origins of this program are, Number 1.

9 Number 2, Judge Boroff in his recent hearing
01:54PM 10 recognized that to this Court should go this Court's
11 obligations, and those are to oversee the ultimate
12 resolution of the tort and the wrongful death claims,
13 and we've cited this in our brief. It comes from the
14 hearing transcript that we've also attached to our
15 filing, and the bankruptcy court has its obligations
16 with respect to the bankruptcy estate and the claims
17 against the bankruptcy estate.

18 The bankruptcy court, both from a
19 constitutional standpoint and the statutory standpoint
01:55PM 20 doesn't have the authority to ultimately resolve the
21 wrongful death and personal injury tort cases. Those
22 are for this Court. In this court already, the Court
23 appointed leadership. The PSC has undertaken
24 significant discovery. You've heard about the 85
25 subpoenas. Mr. Ellis, at the direction of lead counsel,

1 has -- at the request of lead counsel, has undertaken a
2 substantial discovery effort with respect to ARL, and
3 there have been others, other substantial discovery
4 efforts.

5 Ultimately, it will be for the magistrate
6 judge here to resolve the objections to the subpoenas
7 that are outstanding, and the magistrate judge is
8 perfectly capable of doing that, and it would make no
9 sense ultimately, I think, or at least it would be
01:55PM 10 duplicative to then delegate a very substantial portion
11 of the overall effort toward global resolution to
12 another court when it's already happening here. We've
13 already made quite a bit of progress in discovery, and I
14 expect that to continue.

15 Now, what does it mean for this Court to
16 have oversight? I think there are primarily two issues
17 over which this Court would have oversight and where we
18 think those powers may be necessary:

19 First, with respect to discovery. There's a
01:56PM 20 notion that the mediator, the private mediator, paid by
21 the hour or paid by the day would resolve all the
22 discovery disputes in connection with the mediation, and
23 everybody agrees there's going to need to be discovery
24 in the mediation process, we just don't know enough
25 about the claims and the liability of these various

1 potential defendants to know how much they ought to pay.

2 So the question then is what happens when
3 there's a dispute about what information they ought to
4 be producing? One solution would be to have this
5 privately-paid mediator to do it.

6 Another solution, and the PSC submits the
7 better solution is for the magistrate court to oversee
8 that process. In order to do that, we think the
9 ultimate oversight has to be in this court so your Honor
10 could make the referral to the magistrate court for
11 resolving any discovery disputes that bubble up to that
12 level and can't be resolved otherwise. That's something
13 the magistrate court is already doing.

14 The discovery disputes to the extent they've
15 come to your Honor's attention have been largely as a
16 result of the PSC's, entirely as a result of the PSC's
17 efforts to obtain discovery, and the second issue, and
18 this will hopefully be less of an issue, but it may
19 nevertheless be an issue is for your Honor to, or
20 whichever Court oversees it, to decide which entities
21 are no longer permitted to participate in the process,
22 and the order, and I believe this is agreed upon, the
23 order sets forth the process by which your Honor can
24 tell, or whichever Court is overseeing, can tell a
25 defendant that's no longer participating in good faith

01:57PM

01:57PM

1 that you're out of the program, you no longer enjoy the
2 protections that this program offered to you, and you're
3 going to be in litigation. Of course, that litigation
4 would occur in this court regardless.

5 So the oversight, I think, means primarily
6 two things: One, over discovery disputes in the
7 mediation; Number 2, over the continued participation of
8 an uncooperative defendant.

9 Given this Court's constitutional and
01:58PM 10 statutory powers, given the charge of the judicial
11 panel, given the Court's orders to date, it's the PSC's
12 position that the oversight for the mediation program
13 ought to occur here given that it's ultimately going to
14 be the resolution of the tort and wrongful death claims.

15 So that's all I have, your Honor, for now.

16 THE COURT: All right. Thank you. Who
17 wants to take the lead for the trustee/creditors'
18 committee?

19 MS. PARKER: If I may, your Honor?

01:59PM 20 THE COURT: Yes, Ms. Parker.

21 MS. PARKER: Thank you. I just want to take
22 a minute to acknowledge where we are with the mediation
23 order and where we agree, so the plaintiffs' steering
24 committee, the creditors' committee and the trustee all
25 want an order entered that addresses a mediation

1 framework. We all, we hope that there are "jets on the
2 tarmac," to borrow Mr. Sobol's expression from earlier
3 today, lined up and waiting for this order.

4 THE COURT: Not in Philadelphia?

5 MS. PARKER: Hopefully not in Philly,
6 probably not in Boston. We also all want mediation
7 framework that works best, and in large part everyone
8 has agreed on what that framework is. Mr. Chalos has
9 taken you through the areas of disagreement, and I won't
10 repeat that, but I will identify for the Court the two
11 concerns that I think undergird Mr. Chalos' remarks.

01:59PM

12 The first is that the PSC doesn't want the
13 mediation order to inevitably impair the rights of tort
14 victims or wrongful death victims. We wouldn't want a
15 situation where an entity participating in mediation
16 does not identify entities, other entities that may have
17 comparative fault here upfront, and the PSC finds out
18 about it only after the fact in a situation where
19 potentially victims' rights have been foreclosed either
20 by a short statute of limitation or for some other
21 reason.

02:00PM

22 As Mr. Chalos said, it seems to me that the
23 alternative, if information about comparative fault is
24 not provided up front, would be for plaintiffs' lawyers
25 to run to state courts and file nonremoval cases in

1 state courts solely against the particular defendant
2 you're trying to get this information from, for the only
3 purpose of having that defendant answer those particular
4 questions, at which point, as a practical matter, you've
5 lost the efficiency of the MDL, and it seems
6 counterintuitive.

7 PSC's second concern is really one of
8 efficient and nonduplicative process from a resource
9 perspective, so this MDL court is charged with
10 overseeing the litigation of tort victims' claims.
11 There's no dispute about that. This Court is also
12 charged with liquidating those claims. There's no
13 dispute about that either, so what does that mean? That
14 means that this Court is concerned with the strengths
15 and merits of tort claims, with the value of tort
16 claims, with the level at which those claims may
17 ultimately be compromised, and also the discovery needed
18 to assess the value of those claims.

19 Judge Boal is already presiding over
20 discovery disputes relating to these issues. Judge Boal
21 will decide what pain clinics, for example, have to
22 produce in response to the PSC's subpoenas, and she'll
23 decide that on an individual basis, but she certainly
24 will develop familiarity with the issues, and one would
25 anticipate, issue rulings that would be effective and

1 cross-cutting.

2 As Mr. Chalos pointed out, the bankruptcy
3 court cannot, as a matter of jurisdiction, refer
4 discovery disputes to Judge Boal, and so the question
5 becomes does it make sense to have two separate entities
6 dealing with discovery disputes that are relevant to the
7 valuation and liquidation of tort claimants' claims, or
8 is there an efficiency that can be gained by using the
9 knowledge that Judge Boal will be developing in handling
10 these discovery disputes?

02:02PM

11 THE COURT: All right. I want to add, I
12 also don't want to inadvertently or advertently impair
13 the rights of defendants or non-affiliated parties.
14 Mr. Gottfried, I think you wanted to take the torch?

15 MR. GOTTFRIED: Yes, your Honor, if I may.
16 First of all, I want to say that the trustees' only goal
17 with respect to this order is to bring as many
18 unaffiliated defendants and nonparties to the table for
19 a mediation, and that's been the governing principle of
20 his effort in meeting and conferring not only with the
21 PSC and the creditors' committee but also reaching out
22 to unaffiliated defendants to get their views with
23 respect to this process because ultimately they're the
24 ones who have to buy in for it to be successful.

02:03PM

25 And at the beginning of the PSC's

1 presentation, they said these were negotiations among
2 the PSC, the trustee and creditors' committee, and
3 that's accurate, and that's also where our comments
4 really come from.

5 There was a missing party to those
6 discussions, so, as a result, the final proposals that
7 the Court sees, for example, left open for unaffiliated
8 defendants and nonparty input, things like whether the
9 mediator will be the discovery master, or whether it
02:04PM 10 will be the bankruptcy court, or whether it will be
11 Magistrate Boal, and the order you have, and all sides
12 at least agree to, at least the mediator or some
13 judicial officer left that as an open issue because we
14 needed to get input from the people who would be
15 participating as to their views on that, and so that was
16 an input that the trustee gave.

17 Originally we were presented with the choice
18 of a mediator, and, again, our input was that's great,
19 but we really have another leg of this stool that we
02:04PM 20 need to talk to and get their input on, and, again, that
21 process was changed to leave that open, to have a
22 process to get input from unaffiliated defendants.

23 So that's the spirit that we approach this
24 order, so taking the items in order, if that's easier
25 for the Court that Mr. Chalos raised them in, I'd start

1 first with the comparative fault issue. As Mr. Chalos
2 correctly said, our concern is that that's a barrier to
3 entry for defendants and nonparties to participate, and
4 we were particularly concerned about the clause which
5 said that if you don't name these people, it's a
6 "forever hold your peace" requirement.

7 And our initial position in that discussion
8 was we don't think that should be in there. Nothing, by
9 the way, that we're talking about precludes any party
10 from getting this discovery in the mediation process
11 where there's a mutuality of discovery.

12 I mean, one of the things that we keep
13 hearing from defendants is this is completely one-
14 sided, where are we getting our discovery, and so our
15 process has been to defer that to the mediation and let
16 there be a discussion with the mediators to what people
17 really need to facilitate a settlement. That's sort of
18 been our input on this.

19 So, as to this one, no, it shouldn't be in,
20 but we listened to what the PSC and the creditors'
21 committee said, and they said, well, this is really an
22 issue with respect to these three states with a one-year
23 statute of limitations. So, our view was let's have a
24 compromise. That seems like a legitimate reason,
25 appropriate, maybe that can't be deferred to the

1 mediation process, and that's the genesis of our
2 approach is to require with respect to the three states
3 where it seems necessary not to make it a barrier to
4 entry as to other states and to leave out the implorem
5 effect of if you don't raise it, "forever hold your
6 peace" because we're afraid that's a barrier to entry.

7 With respect to the subpoena issue, these
8 are parties who didn't object and otherwise would
9 produce. Even in the original CMO-6, your Honor, one of
10 the initial carrots for people to participate in
11 mediation was if you participate, then the discovery
12 stops, and so our view is that that should be the case,
13 that a carrot to get nonparties and unaffiliated
14 defendants to participate is that discovery stops. That
15 doesn't mean in the context of mediation that more
16 limited, more focus, more targeted discovery that's
17 really necessary to facilitate a mediation doesn't
18 occur.

19 In fact, the order expressly contemplates
20 that, but we are concerned that it's a barrier to entry
21 to say even if you participate, if you haven't objected,
22 you're still producing all of these documents. Our view
23 is it should be a carrot that if you do participate,
24 that stops, and so that's the genesis of that
25 disagreement.

02:06PM

02:06PM

1 Again, that comes from the trustee reaching
2 out and talking to unaffiliated defendants and talking
3 to nonparties and trying to get their input prior to
4 this process and be sensitive to that.

5 The next issue my Brother raised was this
6 mediation committee. I think the first thing I'd like
7 to say about that, your Honor, is the mediation
8 committee is really in the scheme of things very
9 insignificant. It's a committee that was formed to deal
02:07PM 10 literally with scheduling and location and really has no
11 other meaningful function.

12 The genesis, as I've been saying, that the
13 trustee said, you know what, we don't want someone to
14 dictate to folks who are trying to get to participate
15 who are nonaffiliated or nonparties where this is going
16 to be or when it's going to occur. Let's create a
17 mechanism to have a discussion to see if we can get to
18 agreement on that, and failing that, an opportunity for
19 that to be resolved.

02:08PM 20 So, again, I think there really is not much
21 to that issue. I think there's probably some
22 compromised language. That committee has a very narrow
23 and limited focus, if you read paragraph 12 of the
24 order. I think our proposal again makes sense in terms
25 of giving people input into the very, I think,

1 straightforward issues of location and timing.

2 The last issue is the jurisdiction issue
3 with respect to who's overseeing this, and the things
4 that that would involve, your Honor, are ultimately the
5 selection of the mediator, perhaps the discovery
6 disputes, so that's deferred and the like, and there I
7 don't know whether the Court has an opportunity to look
8 at the transcript that the PSC provided to the Court,
9 but pages 105 through 107 of the transcript lay out at
10 least what Judge Boroff believed to be the delineation
11 and the responsibility of the bankruptcy court with
12 respect to this, including that it's his job to get
13 everyone around the table that should be around the
14 table and that his job is to marshal the assets, et
15 cetera.

02:08PM

16 And I command that the Court's view,
17 obviously this Court has the ability at any time to
18 withdraw the reference and sit as the bankruptcy court
19 if it chooses, but as Boroff Judge said, at this point
20 that's not happened. He believes this is his role. I
21 think the trustee believes that he has properly stated
22 his role as it exists today absent the withdrawal of the
23 reference and believes that the best mechanism and the
24 appropriate mechanism for delineation of the various
25 duties and responsibilities here is for the bankruptcy

02:09PM

1 court to oversee this process.

2 Again, I do want to note that both parties
3 agree and both orders suggest that this is supposedly to
4 be largely a self-effectuating process, and the hope is
5 that there will be little or no court involvement, but
6 there are a couple of key things that the Court will be
7 doing including ultimately confirming a selection of the
8 mediator, hopefully something that the parties have
9 agreed to, and for the reasons I would say that

02:10PM 10 Judge Boroff has laid out in pages 105 to 107 of the
11 transcript, you know, we think that the right answer
12 here is what we have proposed to this Court.

13 THE COURT: All right. Yes.

14 MR. COREN: Good afternoon, your Honor. I'm
15 Michael Coren. I'm co-chair of the official creditors'
16 committee, and being one of the people who worked on
17 framing this document, I wanted to take a step back and
18 explain not in detail, but I want to go over the
19 over-arching structure what this was.

02:10PM 20 Your Honor, what we tried to do here is
21 freeze time. It's an armistice, okay. There's a choice
22 to be made, you can litigate, or you can try to resolve
23 your differences, and to do that, because of the
24 complexity of involving a core nucleus group of
25 defendants that expands to 80 clinics, 12 or so

1 national, how do we organize this, okay, and so that we
2 can get this done within the context and time frame that
3 bankruptcy proceedings move to take advantage of the
4 various expertises of the court as outlined by
5 Judge Boroff when he explained the differences in labor
6 that the bankruptcy court has, which is to marshal the
7 assets, gather the people around the table, he said, get
8 the people here to talk.

9 Well, to do that, your Honor, where you have
02:11PM 10 the clock moving under statute of limitations and
11 various other requirements requires steps and measures
12 for those who will agree to mediate to freeze time.
13 When you freeze time, however, you have to protect the
14 rights, so when we look at this, why did we choose to
15 focus on the one year's statute states, because that
16 statute is imminent.

17 We have the pleasure of time with the
18 two-year and three-year and six-year statute states, so
19 to the extent we have comparative fault and provisions,
02:12PM 20 for example, in Florida or in Colorado, we don't have to
21 worry about that because we've got much longer statutes
22 of limitations there, so we're not under that pressure.

23 Once again, this is an armistice that people
24 can, if they want to mediate, but there are certain
25 conditions to mediate. Taking into account, we looked

1 at Rule 26 and self-executing disclosures, we looked at
2 the various things that we thought people would need but
3 left a lot to the discretion of the mediator to start to
4 get the parties together, which then takes us to -- so I
5 believe I covered why did we choose one year, you know,
6 on there as to finishing the subpoenas.

7 If someone wants to voluntarily complete
8 that, that's fine, but as it said, one of the carrots
9 and a big carrot is they get a stay of discovery so that
10 they get better mediation where it will be, we believe,
11 a much more focused, you'll get what you need to do
12 this. There's a big difference in what you need to
13 mediate and make a decision to settle versus what you
14 need to try a case, and that, you know, to the extent
15 you don't need to mediate to come to an intelligent
16 decision.

17 That's, you know, we don't need to do that,
18 and that's where we hope they'll be some guidance. The
19 situs -- oh, the mediation committee. As counsel has
20 just explained to your Honor, that is an administrative
21 committee. That is one so that whoever is chosen as the
22 mediator by the parties doesn't have to have 86 people
23 to try to contact to set up things, to get the
24 administration, to get the payment structure done.

25 So, therefore, we took one from each of the

1 major camps, put them into a committee so that the
2 mediator could just get ahold of those people to resolve
3 those administrative issues. It's a difference, a world
4 of difference from that committee versus who is on the
5 mediation team negotiating a settlement. That is for
6 another day for the mediator.

7 And, finally coming to the issue of the
8 situs, this to us we see as a core bankruptcy matter.
9 The marshalling of assets and the resolution of the
10 claims and the release is a bankruptcy creature.
11 Because of those, we thought it made most sense that
12 this be sitused as to those issues with the bankruptcy
13 court.

14 So unless, your Honor -- those are my
15 remarks. If you have any questions regarding the
16 structure of that, I'm more than happy to answer them.

17 THE COURT: I want to hear if Ms. Parker or
18 Mr. Chalos has a response, but, first, is this matter
19 ripe for resolution? I mean, it's not clear to me
20 whether there's an adversarial party or who it is. In
21 other words, do I have everything in front of me
22 necessary to make the decision? Do I need to allow time
23 for someone to object? How should I proceed
24 procedurally?

25 MR. COREN: Well, 1, it is ripe, your Honor,

1 because we're approaching the time where, first of all,
2 the anniversary of the one year is coming up some time
3 in September. Second, we need to get the process in
4 operation.

5 THE COURT: I understand all that --

6 MR. COREN: That's the adversarial.

7 THE COURT: -- but normally there's a
8 motion, there's 14 days to oppose, and, you know, I hear
9 from the other side. I'm not sure who the other side is
10 here or whether I need to allow somehow leave to
11 intervene to be heard. I guess that's my question.

02:15PM

12 MR. COREN: The concept of it, and I'm
13 addressing that issue on the ripeness, your Honor, is
14 that the whole concept is that there is a time on
15 paragraph 1, a set of time dates that it goes out. 30
16 days people will say whether they want to be in this
17 program or not be in this program by we call it opting
18 in. That occurs 30 days from the date of your order.

19 THE COURT: I understand that. That's a
20 different issue, it's just the entry of the order
21 itself. I'm sorry, I'm sorry, Mr. Gottfried did you
22 want to respond or Mr. Sternklar?

02:16PM

23 MR. GOTTFRIED: I'm happy to respond, your
24 Honor.

25 THE COURT: Yes.

1 MR. GOTTFRIED: I think the filing of these
2 proposed orders was a creature of CMO-6.

3 THE COURT: Right.

4 MR. GOTTFRIED: And, you know, indeed, we
5 had asked for a brief extension from this Court to file
6 the proposed orders --

7 THE COURT: Right.

8 MR. GOTTFRIED: -- so I think there has been
9 notice and opportunity to comment by anyone who is
02:16PM 10 inclined to do so in the context of the original CMO-6,
11 and this is really a proposed order that these three
12 groups have negotiated and put together ultimately for
13 the Court's, you know, decision on, so I think
14 procedurally it is certainly ripe for you to consider
15 and review this and enter it because I think it's a
16 creature of CMO-6.

17 THE COURT: I'm not going to delay the
18 decision for its own sake, but, again, to make sure
19 everyone who needs to have an opportunity to be heard
02:17PM 20 can be heard. Ms. Parker.

21 MS. PARKER: Thank you, your Honor. I am
22 aware of no entity that is waiting to weigh in here,
23 your Honor. I will also note that this is an
24 opportunity for resolving claims that the PSC,
25 creditors' committee and trustee is presenting to

1 defendants. It is by no means the only opportunity for
2 resolving claims, and I think, to put it bluntly,
3 defendants can either opt in or opt out.

4 Certainly if defendants opt in to mediation,
5 there will be play with the mediator in terms of what is
6 appropriate for that defendant, but this is a guideline
7 and a framework that is being presented as an
8 opportunity.

9 THE COURT: All right. That latter point is
02:18PM 10 important to me. I mean, I have not forgotten, I hope,
11 what it's like to be a lawyer, and I sometimes had
12 clients where we were ordered into mediation, and it was
13 not really distinguishable from paying a criminal fine.
14 I mean, it was not really very voluntary, and I think
15 it's important that it be voluntary. Yes, I'm sorry,
16 you're Ms. Taylor?

17 Ms. Fordon: Rebecca Fordon, counsel for the
18 creditors' committee.

19 THE COURT: Ms. Fordon, I'm sorry.

02:18PM 20 Ms. Fordon: I just wanted to make one point
21 in response to your question and a couple additional
22 things. Mr. Gottfried mentioned this. We did attempt
23 to reach many defendants and get their input, and, in
24 fact, we've incorporated quite a bit of their input into
25 this order, and as Ms. Parker says, it's just an option

1 for them if they'd like to resolve their claims, and I
2 just want to emphasize that this process, the creditors'
3 committee sees, at least, and I think we're in agreement
4 with the trustee and the PSC that this is all in aid of
5 negotiation of what we hope will be a Chapter 11
6 resolution that gets recoveries into victims' pockets
7 but occurs through the bankruptcy process, and you heard
8 the comments from Judge Boroff, which the committee also
9 agrees with, that his role, Judge Boroff's role is
02:19PM 10 really to marshal the assets and get people to the
11 table, which is exactly what this mediation will do.

12 And as far as what's involved in
13 administering this program, when we're talking about
14 whether this should be in the bankruptcy court or this
15 court, and I think Mr. Chalos gave two pretty big
16 buckets of that.

17 One is discovery, which we think there needs
18 to be more discussion on, frankly. That includes the
19 defendants so that they can help decide how discovery
02:20PM 20 disputes will be resolved, and it's pretty -- the
21 discovery that's happening we don't view as just plenary
22 discovery because that will cease.

23 The discovery in the MDL, part of the
24 proposed order is that that will discontinue for any
25 participant who wants to be this program, so that's not

1 the discovery we're talking about. What we're talking
2 about is discovery in aid of the mediation, and we think
3 the mediator is in the best position to decide what that
4 discovery should be.

5 He or she will be the one involved in
6 day-to-day discussions with participants, and we think
7 that mediator should at least be in charge of that part,
8 and then the other big bucket is what happens if people
9 aren't cooperating, how do you get people out of

02:21PM

10 mediation, and, again, it's primarily the mediator who
11 would be involved in that and only if there's a dispute
12 would it go to the court, and we do think the bankruptcy
13 court is most appropriate for that.

14 One of the requirements for participating in
15 mediation that we all agree on is that a participant
16 file a proof of claim in the bankruptcy court, and that
17 brings everyone within the auspicious of the bankruptcy
18 court. There's some people we hope to involve that
19 aren't currently in the MDL, and this is one way to
20 bring them in the process.

02:21PM

21 Then there's a few other things that I just
22 want to run through just so your Honor is aware of what
23 we're asking as, you know, as the scope of supervising
24 mediation. There's proposals for a fee sharing
25 structure and for the identity of a mediator. If people

1 can't agree, we'll go to we suggest the bankruptcy
2 court. Then I mentioned discovery, and I mentioned
3 termination of mediation, also to resolve disputes as to
4 schedule, location and time of mediation sessions, and
5 then to modify the terms of the mediation program, if
6 necessary, to facilitate mediation.

7 So just as far as process, what we're asking
8 your Honor to do is enter this order and give the
9 bankruptcy court supervision over the mediation, and
02:22PM 10 then the next step would be for us to go to the
11 bankruptcy court and get approval before Judge Boroff,
12 and if he thought there were, you know, revisions that
13 were necessary to facilitate mediation, then we could
14 address it with him.

15 THE COURT: All right. Thank you,
16 Ms. Fordon. I will take the matter under advisement.
17 Next up, Ms. Parker, we're on Number 3, scheduling
18 issues.

19 MS. PARKER: Yes, your Honor.

02:23PM 20 [Pause]

21 THE COURT: If you're not sure what that
22 means, we can skip to Number 5.

23 MS. PARKER: No, sadly, no. As your Honor
24 knows, and I believe everyone in the courtroom knows, as
25 well as everyone on the phone, the prevailing case

1 management order, which is CMO-6, sets forth a schedule
2 for all major discovery and litigation activities in
3 this case.

4 It is the plaintiffs' steering committee's
5 position that that schedule needs to be radically
6 overhauled in light of the lack of progress in this
7 case. So what do I mean by that? The plaintiffs'
8 steering committee was informed some time ago that the
9 trustee was undertaking settlement discussions with
02:24PM 10 NECC-affiliated entities and that it was hopeful that
11 those settlement discussions would be fruitful.

12 Because the PSC understood that the trustee
13 was taking on that task, the PSC agreed to stay
14 discovery against the affiliated defendants, so I'm
15 setting NECC aside, your Honor, when I say that. I'm
16 talking about the defendants who are affiliated with
17 NECC but not NECC. That agreement was reached some six
18 months ago.

19 We understand that the trustee is continuing
02:25PM 20 to work through those settlement processes, and we don't
21 mean to suggest that the trustee has been shirking his
22 responsibilities there certainly, however, six months
23 later there has been no material change in settlement
24 status. There has been no proposal that has been
25 presented to the PSC, and in light of that, we believe

1 that we will now need to take discovery of the
2 affiliated defendants and that their active
3 participation in a litigation mode fundamentally shifts
4 the schedule that we had previously set out for this
5 Court.

6 Now, we have shared with the defendants that
7 the PSC has that opinion. We have not, however,
8 presented to the defendants a schedule that the PSC
9 thinks would be reasonable and appropriate for moving
10 forward. We intend to do that and meet and confer with
11 the defendant before the next status conference so that
12 this will be teed up and ripe for your Honor to discuss
13 or decide at the next status conference.

14 I will say though as an interim step because
15 we do have some deadlines coming up that it is the PSC's
16 position that the dates that will occur this fall will
17 need to be pushed out at least two to three months, so,
18 in particular, the date for filing a master complaint
19 and short form complaints as well as the discovery
20 deadlines.

21 I mention that not to try and negotiate
22 today dates by which those should be adjusted to but
23 rather so that perhaps we can put a mechanism in place
24 whereby everyone understands that this is what the PSC
25 is contemplating and that we will have that schedule

1 teed up for the Court before the next status conference.

2 THE COURT: My preference is to, and I
3 express no opinion on the matter, but to have you
4 discuss it, try to reach agreement, if you can, if you
5 can't, tee it up in a motion in opposition, and I can
6 resolve it hopefully at the next status conference.

7 I would -- I do want the case to move with
8 all deliberate speed, and short extensions are easier to
9 grant than long extensions. Without prearguing the
02:27PM 10 case, Mr. Gottfried, does anyone want to respond to
11 this?

12 MR. GOTTFRIED: Thank you, your Honor. I
13 think the point that I want to make is, one, yesterday
14 Mr. Moore met -- the trustee -- met with representatives
15 of the affiliated defendants. He provided a written
16 report of how progress was going to Mr. Sobol of the PSC
17 at the end of the day yesterday. He reported that he
18 thought that progress was continuing to be made and that
19 he had further meetings scheduled for next week, and so
02:28PM 20 I think any suggestion that this process has not been
21 going forward in good faith would be not consistent with
22 the trustee's view.

23 The trustee's view is that the parties are
24 working diligently to see if a resolution can be
25 achieved, that progress is being made and that he's been

1 reporting that progress, as appropriate, to the PSC
2 consistent with your order, so I guess from our
3 perspective, the trustee's perspective, I think that
4 preamble to the discussion of the deadlines is something
5 that we would not agree with.

6 In terms of extending deadlines in a
7 practical sense, certainly we do agree to that and think
8 that your suggestion, your Honor, with respect to that
9 is appropriate, including your admonition that the
10 extension should be short.

02:28PM

11 THE COURT: And deadlines do have a way of
12 focusing everyone's attention and bringing matters to
13 closure that otherwise wouldn't come to closure.

14 MR. GOTTFRIED: Absolutely, your Honor.

15 THE COURT: Let's put that on pause, and
16 we'll take it up at the next status conference.

17 MS. PARKER: If I may, your Honor, I'd just
18 like to be very clear that the plaintiffs' steering
19 committee's position with respect to the affiliated
20 defendants is that an affiliated defendant is either in
21 settlement mode or a litigation mode, and if we're in
22 litigation mode, there's a lot of work to be done.

02:29PM

23 Thank you.

24 THE COURT: All right. Number 5, sharing of
25 documents.

1 MR. FERN: Your Honor, Frederick Fern. This
2 is an item I placed on the agenda. Just yesterday
3 afternoon I received an e-mail from Mark Zamora on
4 behalf of the PSC advising what Ms. Parker had just told
5 the Court about that there were documents received from
6 various national defendants, that they would be put into
7 the repository at U.S. Legal and that he would be
8 providing us some type of mechanism to gain access to
9 that. That has not yet occurred, but that occurred
10 after this item appeared on the agenda, so I think let
11 the process prevail, and hopefully it will resolve
12 itself, and it won't have to be discussed at the next
13 conference in September.

02:29PM

14 THE COURT: All right. Anything more on
15 that topic?

16 MS. PARKER: No, your Honor.

17 MR. FERN: Your Honor, Number 6 again is
18 also my -- an item that I asked to be put on the agenda.
19 It may be a nonissue based upon an e-mail that I
20 received from Ms. Parker about an hour before appearing
21 here in court, but let me advise the Court of what the
22 issue is. Under the initial stipulated protective order
23 that your Honor entered in this case, the names of
24 patients were protected. In reviewing documents that we
25 are -- in reviewing for privilege purposes to produce to

02:30PM

1 the PSC as part of the informal discovery that the
2 trustee negotiated on behalf of NECC, we have found
3 multiple documents that have information other than just
4 patient names, for instance, diagnosis, dates of
5 treatment, drugs being prescribed, the treatment to be
6 rendered.

7 Those -- that information can be redacted,
8 Judge, but at a tremendous effort and cost. This
9 applies to only paragraph 2A of the protective order.

02:31PM

10 We had asked Ms. Parker on behalf of the PSC if there
11 would be any problem with us producing these documents
12 which would then expedite their production without
13 producing -- with producing this healthcare information.

14 We had provided --

15 THE COURT: HIPAA information, not
16 privileged, right, in other words, if you have it, it's
17 not privileged?

18 MR. FERN: Well, we have it on behalf of

02:31PM

19 NECC, and they were the provider on behalf of the
20 patient, so it would be a prescription coming from a
21 pain clinic, coming from NECC with a patient name saying
22 we want to do an epidural injection of
23 methylprednisolone on this date.

24 THE COURT: Again, if I'm seeing this
25 clearly, that's not an issue of physician-patient

1 privilege, you're not a physician, it's a HIPAA
2 confidentiality-type issue?

3 MR. FERN: Well, NECC as a pharmacy would be
4 under the same type of privilege as a physician would
5 be.

6 THE COURT: The reason the I'm raising it is
7 it's not clear to me that anyone other than the patient
8 can waive the privilege if it is privileged. In any
9 event, go on.

02:32PM 10 MR. FERN: Well, that was what your Honor's
11 qualified protective order intended to accomplish --

12 THE COURT: I may not be thinking it through
13 carefully.

14 MR. FERN: -- in way of the subpoenas. So
15 we have some language that we had proposed that the PSC
16 has now approved regarding producing healthcare
17 information. Now that I have the PSC's approval, your
18 Honor, we can submit that to you via motion or submit
19 the amended protective order to you on Monday for the
02:33PM 20 Court's consideration and approval.

21 THE COURT: All right. Does anyone want to
22 respond to that?

23 MS. PARKER: Mr. Fern has accurately
24 reported that the PSC has no objection to the amendment
25 to the protective order.

1 THE COURT: I'm indifferent as to whether it
2 comes to me as a proposed order or motion, whatever is
3 easier from your perspective.

4 MR. FERN: You'll have that early next week,
5 Judge.

6 THE COURT: Just so you all know, I am going
7 to be in Washington for most of next week, and then I
8 disappear on vacation, so early is better than later. I
9 can access things remotely from Washington, but my
10 willingness to do so on vacation is more limited.

02:33PM

11 All right. Number 7, liaison counsel for
12 unaffiliated defendants.

13 MR. FERN: Your Honor, this was a -- though
14 it's not my topic, I'll be glad to speak on it.

15 THE COURT: All right.

16 MR. FERN: You had at the last case
17 management conference, you had directed that any
18 unaffiliated defendant who wanted to step up and serve
19 as liaison submit a proposal to you. As I had predicted
20 to others, that did not happen.

02:34PM

21 The Court is now left in a quandary as to
22 whether you select somebody, and since everyone took one
23 step backwards, and we have no volunteers, I really have
24 no suggestion how the Court would do that or do we
25 proceed at this point without a liaison for the

1 unaffiliated defendants, or do we simply wait until we
2 get to the mediation process when that liaison counsel
3 may become apparent based upon various items depending
4 on their experience in a Mass. tort mediation process,
5 perhaps the extent of the insurance coverage available
6 to them, perhaps the extent of the number of cases that
7 individual has in the process and just pro facto, that
8 person becomes the lead on behalf of the unaffiliated
9 defendant?

02:35PM 10 THE COURT: I'm no further along than I was
11 a month ago, which is it certainly sounds like a good
12 idea from a practical standpoint. It's not clear to me
13 what authority I have, what the mechanism is. There's
14 no procedure for an election. Whoever I would select
15 would have higher level bills in terms of the client.
16 I'm just very unsure of myself here.

17 MR. BLUMBERG: Your Honor, are we allowed to
18 speak from the phone?

19 THE COURT: Who is this?

02:35PM 20 MR. BLUMBERG: This is Jay Blumberg on
21 behalf of the Premier defendants in New Jersey.

22 THE COURT: Yes, you indicated you wanted to
23 speak, so I'll let you speak. Go ahead.

24 MR. BLUMBERG: With respect to the liaison
25 counsel issue, I have discussed it with a number of my

1 colleagues who are not yet defendants, some who are
2 defendants, and there was no -- although we had some
3 identity of interest, there was really no way that we
4 could determine who, and I don't want me speaking to be
5 in any way construed, but there was really no way that
6 we could determine who should be liaison or whether it
7 would even work, so at this point in time I don't
8 believe that there's any feasible way for either the
9 Court to appoint a liaison counsel for unaffiliated
10 defendants or for the unaffiliated defendants to choose
11 one among themselves because in many ways, our interests
12 are not identical.

02:36PM

13 THE COURT: All right. I mean, the only
14 thing that occurs to me is to the extent, you know, any
15 affiliated defendant is filing a claim in the bankruptcy
16 court, there could be some mechanism there, they may be
17 just another unsecured creditor, I don't know at that
18 point. I'm inclined to muddle through without liaison
19 counsel, at least for the time being, unless someone has
20 a better idea.

02:36PM

21 Hearing no -- yes, I'm sorry, Mr. Blumberg.

22 MR. BLUMBERG: I just think at this point in
23 time, it may not be the most effective way, but, I think
24 it's, you know, based on my experience in talking to a
25 number of the unaffiliated defendants, I just don't see

1 it as being workable.

2 THE COURT: All right. Without finally
3 resolving the issue, I'm just going to put that on hold
4 for the time being, and, again, we'll see how it plays
5 out. It could well be, as Mr. Fern suggested, I mean,
6 it might depend, for example, how many insurers are
7 involved, what the stakes are. It may be that there are
8 a small number of lawyers who as a practical matter come
9 to the fore, but I think we're fairly far from that
10 point.

02:37PM

11 MR. BLUMBERG: Judge, can I just go back for
12 one issue on the mediation order very quickly?

13 THE COURT: Yes.

14 MR. BLUMBERG: With the Court's permission,
15 this doesn't deal with the issues that were addressed
16 previously, it's more that I know a number of the
17 unaffiliated defendants and some of the people who
18 aren't even defendants had a limited amount of time to
19 respond to the proposed mediation order.

02:38PM

20 The only thing I would -- and obviously as
21 the Court, I think, has indicated before, we're one of
22 the legs of the table that really needs to be able to
23 make this work.

24 The timing is one thing that I would ask the
25 Court to take into consideration, and I would just

1 educate, and I'm sure the Court is aware, for us to
2 decide whether to opt in or opt out, there's a number of
3 things that have to happen. One is we have to know how
4 what the terms are, and that's how much discovery is
5 likely to occur, what it's going to cost, what is going
6 to be, you know, the mechanism of the mediation, all of
7 which is in flux at this point, and then it gives us 30
8 days to decide whether we're going to opt in or opt out.

9 I've got to say that as a defendant, I have
02:39PM 10 to meet not only with my client, but I've got to then
11 meet with my insurance carrier, and I've got to then
12 have decisions by all of them as to whether they want to
13 opt in. In the middle of vacation season, I don't see
14 it being workable, at least from my perspective, and I
15 may be alone on this, but I just don't see 30 days being
16 workable in terms of an opt-in date when all of this
17 education has to take place with respect to my clients,
18 and these are pretty heavy decisions as to whether to
19 opt in or opt out, so I just wanted to say that the time
02:39PM 20 limits of 30 days and then 14 days and then 7 days to
21 pick certain things, I would just ask that they be
22 relaxed a little bit or at least have an opportunity to
23 relax then if the Court is going to enter the mediation
24 order.

25 THE COURT: All right. Point noted. I will

1 take that into account.

2 MR. BLUMBERG: Thank you, your Honor.

3 THE COURT: All right. Number 8,
4 multi-plaintiff complaints.

5 MS. PARKER: As I understand it,
6 Mr. Moriarty and Mr. Lipton, who had added that agenda
7 item, have agreed to put that over until the next status
8 conference.

9 THE COURT: All right. Pending motions to
02:40PM 10 dismiss, are those simply going to be rolled over again?
11 Is there a different plan? Yes, I'm sorry.

12 MR. CIPORKIN: As to Alaunus, yes, for now,
13 your Honor.

14 THE COURT: I'm sorry, Ms. Parker.

15 MS. PARKER: We listed those there, your
16 Honor, because they are motions that are currently
17 pending before the Court, but I don't believe that the
18 Court needs to take any action on them at this time.

19 THE COURT: All right. I will continue the
02:40PM 20 stay, if that's the right word on those motion to
21 suppress. ALR's motion for a protective order.

22 MR. WALTON: Your Honor, Ken Walton for ALR.
23 We're going to put that over as well, if it's
24 permissible to the Court.

25 THE COURT: All right. Number 10 I think

1 we've taken up already. Is there anything more on that,
2 Ms. Parker?

3 MS. PARKER: No, your Honor.

4 THE COURT: Number 11, status of bankruptcy
5 proceedings, who wants to take the lead here?
6 Mr. Gottfried.

7 MR. GOTTFRIED: Yes, your Honor. I think
8 we've talked about some of this already, but as I
9 reported in the past, the trustee continues to
10 administer the estate, collect receivables, pay bills
11 actively negotiating with the affiliated defendants,
12 which he believes he's making progress.

13 As I indicated, he met with him as recently
14 as yesterday, reported to the PSC and is to be meeting
15 with him again next week, obviously been active in
16 negotiating this mediation order that we've been talking
17 today.

18 There's certainly been activity in the
19 bankruptcy court. I think it's self-explanatory. I'm
20 sure the Court, you know, has seen the various actions
21 that Judge Boroff has taken. There's further hearings
22 scheduled for August 22d, and unless you have any
23 questions, I think --

24 THE COURT: August 22d is the bar date
25 hearing, right?

1 MR. GOTTFRIED: That's correct, your Honor.
2 I saw actually as I was walking over here, I think he's
3 also scheduled a mediation order for that date as well.

4 MR. BLUMBERG: This is Jay Blumberg again.
5 I was one of the individuals who filed a motion for
6 reconsideration of Judge Boroff's order to produce
7 specific patient's names who are not defendants in this
8 case, and that motion for reconsideration was promptly
9 denied. There is -- I want this Court to just be aware
10 that if it hasn't been filed yet, I anticipate that it
11 will be filed by Monday an appeal of Judge Boroff's
12 decision. I believe it's to the District Court.

13 THE COURT: An appeal to me anyway?

14 MR. BLUMBERG: I don't know, but it is an
15 appeal of Judge Boroff's decision. It will be filed,
16 and concurrently with that or shortly after that, we
17 will be applying for a stay of Judge Boroff's decision
18 to supply the patient names. I wanted the Court just to
19 be aware that that was something it isn't -- I don't
20 believe it's been filed yet, but I anticipate that by
21 Monday it will be.

22 THE COURT: All right. I'm assuming that
23 any appeal would be assigned to me as a related matter.
24 I guess I'm shooting from the hip there, but I think it
25 ought to work that way. All right. If an appeal is

1 filed, I'll take it up in due course. I don't know what
2 else to say.

3 MS. PARKER: A word about the timing there,
4 your Honor.

5 THE COURT: Yes.

6 MS. PARKER: So on July 29th, Judge Boroff
7 issued an order that required production of some patient
8 information by pain clinics and healthcare providers.
9 That order, as it currently stands, requires that
10 clinics listed on Exhibit A, which is attached to the
11 order, produce that patient information by August 16th,
12 so that is a deadline that is upon us.

13 THE COURT: All right.

14 MR. BLUMBERG: That would be the stay that
15 we are applying for actually.

16 THE COURT: I'm sorry.

17 MR. BLUMBERG: That would be the stay that
18 we are applying for --

19 THE COURT: Yes.

20 MR. BLUMBERG: -- once the appeal is filed.
21 That's what I was referring to.

22 THE COURT: All right. In other words, a
23 stay pending appeal?

24 MR. BLUMBERG: Correct.

25 THE COURT: All right. Anything else on the

1 status of bankruptcy?

2 (No response)

3 THE COURT: All right. Anything else on any
4 issue at all not on the agenda? Anything from the
5 plaintiffs' side?

6 MR. CHALOS: Your Honor, Mark Chalos. I
7 have just one point to make regarding the mediation
8 order --

9 THE COURT: Yes.

02:44PM

10 MR. CHALOS: -- and the comment Mr. Blumberg
11 made on the phone about the 30 days.

12 THE COURT: Yes.

13 MR. CHALOS: We're about six weeks away from
14 the first statute of limitations running, at least the
15 one year states. Much more than 30 days will require, I
16 think, plaintiffs in those states to at least very
17 strongly consider filing their cases, which I think is
18 something that the mediation program is attended to
19 avoid, at least that expenditure of resources.

02:45PM

20 In Tennessee, at least, we have to have
21 experts review all our cases and give a certificate of
22 merit before we file it, and those are, you know, very
23 expensive, many thousands of dollars to do, and I know
24 some lawyers, at least, have been waiting before they
25 expend those resources to see what, you know, is coming

1 out of this mediation order, so the mediation order
2 doesn't do much more than put some details around the
3 program your Honor designed and put in the June 28th
4 order.

5 You know, that's about six weeks ago or so,
6 so for any clinic lawyer who hasn't started educating
7 their clients, I think they might be well-advised to
8 start educating their clients, and if it's going to be
9 meaningful, as we all intend it to be, I think it's got
10 to be in advance of the one-year statute states losing
11 their statute of limitations, so we ask your Honor to
12 look strongly as being the 30 days to be the appropriate
13 measure. Thanks.

02:46PM

14 THE COURT: I thought I heard Mr. Blumberg
15 say that if he doesn't obtain relief from 30 days, he
16 would seek an opportunity for relief, which is, I
17 assume, an opportunity to relax or modify a deadline
18 under appropriate circumstances.

19 All right. Anything else from plaintiffs'
20 side?

02:46PM

21 MS. PARKER: No, your Honor.

22 THE COURT: From the trustee?

23 MR. GOTTFRIED: Just one issue, your Honor.

24 THE COURT: Mr. Gottfried.

25 MR. FERN: Going back to the mediation

1 order, in light of the fact that no unaffiliated
2 defendants stepped up to be liaison counsel, I think
3 when you review the orders, and the orders, I think, are
4 the same with respect to this in terms of creating an
5 NDC mediation committee, I think it would be a modest
6 edit to suggest that if such a committee is not formed
7 or assembled that the interested parties and the
8 interested unaffiliated non-debtor claimants could
9 submit suggestions as to who the mediator could be and
10 things of the nature, so I think we need to just build
11 in the fact that maybe no one will step up again, and I
12 think that's an easy edit, and if it's acceptable to the
13 Court, I'd be happy to send that to the Court as a blue
14 line in a couple of places where that sort of edit would
15 be appropriate.

16 THE COURT: Why don't you go ahead and do
17 that.

18 MR. GOTTFRIED: Thank you, your Honor.

19 THE COURT: All right. Unsecured creditors'
20 committee, anything further?

21 MR. COREN: No, your Honor, we're fine.

22 THE COURT: Anyone from the defense side?
23 Anyone else?

24 (No response).

25 THE COURT: All right. Thank you, all, have

1 a good week. I hope you don't get stuck in Philadelphia
2 on your way out. I should point out I'm really tweaking
3 my law clerk, who's from Philadelphia here. It's a
4 worthy topic.

5 [Laughter]

6 MR. COREN: Your Honor, you've been striking
7 a nerve with me. I'm from Philadelphia.

8 THE COURT: All right. You're just
9 collateral damage here. I will see you September --

02:48PM 10 THE CLERK: September 12th.

11 THE COURT: Let's set a November date as
12 well, let's keep rolling about 60 days in advance.

13 THE CLERK: September 12th, October 8th,
14 November 7th at 1:30.

15 THE COURT: Thursday, November 7th at 1:30?

16 (No response)

17 THE COURT: Hearing no objection,
18 November 7th at 1:30. Thank you, all.

19 (Whereupon, the hearing was adjourned at
02:48PM 20 2:48 p.m.)

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22

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24

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C E R T I F I C A T E

UNITED STATES DISTRICT COURT)
DISTRICT OF MASSACHUSETTS) ss.
CITY OF BOSTON)

I do hereby certify that the foregoing
transcript, Pages 1 through 64 inclusive, was recorded
by me stenographically at the time and place aforesaid
in MDL NO. 13-02419-FDS, IN RE: NEW ENGLAND COMPOUNDING
PHARMACY CASES LITIGATION and thereafter by me reduced
to typewriting and is a true and accurate record of the
proceedings.

Dated this August 14, 2013.

s/s Valerie A. O'Hara

VALERIE A. O'HARA

OFFICIAL COURT REPORTER